In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 49 Original

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

STATE OF ILLINOIS, ex rel.
WILLIAM J. SCOTT, Attorney General of Illinois,

Plaintiff,

vs.

CITY OF MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF KENOSHA, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF RACINE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF SOUTH MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, a municipality existing under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof,

Defendants.

MEMORANDUM BRIEF

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Defendants.

MEMORANDUM BRIEF

[This memorandum is prepared in accordance with a telegram received from Robert E. Seaver, Clerk of the Supreme Court of the United States. The telegram requested a typewritten memorandum on the following issue:

> "Would Federal or state law govern the substantive issues sought to be presented for decision in original actions such as this one?"]

In our brief heretofore submitted, we respectfully contended that neither the importance nor the urgency of the subject matter of the petition of the State of Illinois required that this Court accept original jurisdiction.

I.

Under the doctrine of Erie R. Co. vs. Tompkins, the substantive issues are governed by state law.

In response to the question as to whether Federal or State law governs the substantive issues presented, it is our position that in adherence with prior decisions of this Court and existing Federal Statutes relating to the subject matter, that State law governs.

> *Erie R. Co.* v. *Tompkins* (1937), 304 U.S. 64, 58 S.C. 817, 82 L. Ed. 1188;
> *Wallis* v. *Pan American Petroleum Corp.* (1966), 384 U.S. 63, 86 S.C. 1301, 16 L. Ed.(2d) 369;
> *Guaranty Trust Co.* v. *York* (1945), 326 U.S. 99, 65 S.C. 1464, 89 L.Ed. 2079, 160 A.L.R. 1231.

Under the *Erie* doctrine, this Court decided that Federal Courts are to apply State substantive law whether contained in judicial decision or in statutes. In the instant controversy, the complaint of the State of Illinois charges defendant City of Milwaukee with pollution of Lake Michigan. The allegations relate to questions of State substantive law involving the law of nuisance and the substantive law of torts, as well as the related question of adequacy of remedies provided by the laws of Wisconsin. A substantive issue under State law involves the determination of whether the alleged acts attributable to this defendant are reasonable under all of the circumstances.

The State of Wisconsin has declared its public concern of pollution of waters within and surrounding waters. It has enacted comprehensive statutes and granted power to a centralized State agency to mobilize all of the State's powers and resources to protect the water quality of Lake Michigan and all other water resources. The Wisconsin Statutes created a Department of Natural Resources to protect, maintain and improve the management of the waters of the State and to provide for a comprehensive State enforcement program to abate present and potential sources of water pollution.[1]

We respectfully submit that with deference to the doctrine of *Erie R. Co.* v. *Tompkins, supra,* the State of Illinois may make complaint to the Wisconsin Department of Natural Resources to obtain the corrective action it seeks. This Department is granted broad statutory powers by state law to investigate complaints from any source involving alleged water pollution.

II.

This Court, in the exercise of its discretion, should decline to accept original jurisdiction.

The matters raised by the motion brought by the State of Illinois for leave to file a complaint were considered in a similar case wherein the State of Ohio sought to file a complaint for abatement of a nuisance involving pollution of Lake Erie. We respectfully submit that the same considerations which prompted this Court to decline to entertain the complaint by the State of Ohio are applicable to this case.

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[1] We have attached to this Memorandum as Appendix "A" pertinent sections of the existing Wisconsin Statutes.

Ohio v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 28 L. Ed. (2d) 256, decided March 23, 1971.

In that case, this Court, while noting that a State should not be compelled to resort to the tribunals of another State for redress, nevertheless declined jurisdiction. While there may have been other compelling reasons for that conclusion, we do draw the inference that merely because Illinois is suing Wisconsin municipalities, that fact in and of itself should not prompt the conclusion that it cannot obtain its relief, if entitled thereto, by proceeding under the Statutes of the State of Wisconsin or by pursuing its remedies in the Federal District Court. The decision of this Court in *Wyandotte, supra,* also appears to have been related to the prior decision of this Court in the *Erie R. Co. Case, supra.*

III.

The controlling Federal Statute recognizes the primary responsibilities and rights of the States to prevent and abate water pollution.

We further respectfully contend that State law is applicable. Such contention finds its support in the national policy with respect to prevention and abatement of water pollution as declared by the Congress. The Federal Statutes emphasize cooperation by state groups such as the "Lake Michigan Enforcement Conference" in dealing with pollution. The community of interest that each State has, and their cooperative and joint action, may better achieve a constructive result to deal with pollution.

We respectfully submit that this is the proper remedy to resolve the dispute which Illinois points to in this action. The Federal Statutes offer effective procedures and adequate alternatives.

The principal declaration of Federal policy with respect to water pollution control and prevention is stated in 33 U.S.C. §1151, as follows:

> "§1151. Congressional declaration of policy in controlling water pollution; right of States to waters
>
> (a) The purpose of this chapter is to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution.
>
> (b) In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the prevention and control of water pollution, *it is hereby declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution,* to support and aid technical research relating to the prevention and control of water pollution, and to provide Federal technical services and financial aid to State and interstate agencies and to municipalities in connection with the prevention and control of water pollution. . ." (Emphasis supplied)

Under the above provisions, we draw the conclusion that the primary responsibility for control of water pollution rests with the States.

A compact exists between the State of Wisconsin and the State of Illinois (and other States) for the prevention and control of water pollution in the Great Lakes.[2]

---

[2] For informational purposes only we have made reference to Public Law 90-419, enacted by the 90th Congress as S. 660 (July 24, 1968). We are hereby attaching a copy of the "Great Lakes Basin Compact" as set forth in the Act as Appendix "B".

Section 1160 (b) of the Federal Water Pollution Control Act (33 U.S.C. §1160) declares the Federal policy to encourage interstate cooperation. The aforementioned section expressly provides that Federal enforcement action "shall not" (except as otherwise provided by or pursuant to court order under subsection (h) of this section) displace either State or cooperative interstate action.

The Governor of an affected State may invoke Federal enforcement procedures under the provisions of §1160 (d). Pursuant to that procedure, a conference is held and a hearing board convened to make findings and recommendations (§1160 (f)). Further provision exists for Federal enforcement by the Attorney General of the United States (§1160 (g)(2)).

In *Connecticut* v. *Massachusetts* (1931), 282 U.S. 660, 51 S. Ct. 266, 75 L. Ed. 602, this court said:

> "For the decision of suits between States, federal, state and international law is considered and applied by this court as the exigencies of the particular case may require. * * *"

We respectfully submit that the exigencies of this case urge that the State law be applied to the substantive issues.

CONCLUSION

We respectfully conclude that under the *Erie R. Co.* v. *Tompkins* doctrine the substantive issues are covered by State law. The controlling Federal Statutes recognize the primary responsibility and rights of the States to prevent and abate water pollution.

Respectfully submitted,

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APPENDIX "A"

[Pertinent sections of the Wisconsin Statutes]

144.025 Department of natural resources—water resources. (1) STATEMENT OF POLICY AND PURPOSE. The department of natural resources shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private. Continued pollution of the waters of the state has aroused widespread public concern. It endangers public health and threatens the general welfare. A comprehensive action program directed at all present and potential sources of water pollution whether home, farm, recreational, municipal, industrial or commercial is needed to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water. The purpose of this act is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. To the end that these vital purposes may be accomplished, this act and all rules and orders promulgated pursuant thereto shall be liberally construed in favor of the policy objectives set forth in this act. In order to achieve the policy objectives of this act, it is the express policy of the state to mobilize governmental effort and resources at all levels, state, federal and local, allocating such effort and resources to accomplish the greatest result for the people of the state as a whole. Because of the importance of Lakes Superior and Michigan and Green Bay as vast water resource reservoirs, water quality standards for those rivers emptying into Lakes Superior and Michigan and Green Bay shall be as high as is practicable.

(2) POWERS AND DUTIES. (a) The department shall have general supervision and control over the waters of the

state. It shall formulate no later than July 1, 1968, a long-range, comprehensive state water resources plan for each region, as fixed by the department under sub. (4), to guide the development, management and protection of water resources. Such plan shall thereafter be carried out by the department. Such plan shall be reviewed and projected by the department every 2 years and a report thereon submitted to the governor by September 1 of each odd-numbered year. The department also shall formulate plans and programs for the prevention and abatement of water pollution and for the maintenance and improvement of water quality.

(b) The department shall adopt rules setting standards of water quality to be applicable to the waters of the state, recognizing that different standards may be required for different waters or portions thereof. Such standards of quality shall be such as to protect the public interest, which include the protection of the public health and welfare and the present and prospective future use of such waters for public and private water supplies, propagation of fish and aquatic life and wildlife, domestic and recreational purposes and agricultural, commercial, industrial and other legitimate uses. In all cases where the potential uses of water are in conflict, water quality standards shall be interpreted to protect the general public interest.

(c) The department may issue general orders, and adopt rules applicable throughout the state for the construction, installation, use and operation of practicable and available systems, methods and means for preventing and abating pollution of the waters of the state. Such general orders and rules shall be issued only after an opportunity to be heard thereon has been afforded to interested parties.

Sec. 144.025

(j) The department may enter into agreements with the responsible authorities of other states, subject to approval by the governor, relative to methods, means and measures to be employed to control pollution of any interstate streams

and other waters and to carry out such agreement by appropriate general and special orders. This power shall not be deemed to extend to the modification of any agreement with any other state concluded by direct legislative act, but, unless otherwise expressly provided, the department shall be the agency for the enforcement of any such legislative agreement.

144.56 Review of orders. Any owner or other person in interest may secure a review of the necessity for and reasonableness of any order of the department of natural resources in the following manner:

(1) They shall first file with the department a verified petition setting forth specifically the modification or change desired in such order. Such petition must be filed within 60 days of the issuance of the orders sought to be reviewed. Upon receipt of such a petition the department shall order a public hearing thereon and make such further investigations as it shall deem advisable. Pending such review and hearing, the department may suspend such orders under terms and conditions to be fixed by the department on application of any such petitioner. The department shall affirm, repeal or change the order in question within 60 days after the close of the hearing on the petition.

(2) The determination of the department shall be subject to review as provided in ch. 227.

144.57 Penalties. Any person who violates this chapter, or who fails, neglects or refuses to obey any general or special order of the department, shall forfeit not less than $10 nor more than $5,000, for each violation, failure or refusal. Each day of continued violation is a separate offense. While the order is suspended, stayed or enjoined, such penalty shall not accrue.

APPENDIX "B"

Public Law 90-419
90th Congress, S. 660
July 24, 1968
AN ACT

Granting the consent of Congress to a Great Lakes Basin Compact, and for other purposes.

Great Lakes Basin Compact, Consent of Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given, to the extent and subject to the conditions hereinafter set forth, to the Great Lakes Basin Compact which has been entered into by the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin in the form as follows:

"GREAT LAKES BASIN COMPACT

"The party states solemnly agree:

"ARTICLE I

Purposes.

"The purposes of this compact are, through means of joint or cooperative action:

"1. To promote the orderly, integrated, and comprehensive development, use, and conservation of the water resources of the Great Lakes Basin (hereinafter called the Basin).

"2. To plan for the welfare and development of the water resources of the Basin as a whole as well as for those

portions of the Basin which may have problems of special concern.

"3. To make it possible for the states of the Basin and their people to derive the maximum benefit from utilization of public works, in the form of navigational aids or otherwise, which may exist or which may be constructed from time to time.

"4. To advise in securing and maintaining a proper balance among industrial, commercial, agricultural, water supply, residential, recreational, and other legitimate uses of the water resources of the Basin.

"5. To establish and maintain an intergovernmental agency to the end that the purposes of this compact may be accomplished more effectively.

"ARTICLE II

Effective date.

"A. This compact shall enter into force and become effective and binding when it has been enacted by the legislatures of any four of the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin and thereafter shall enter into force and become effective and binding as to any other of said states when enacted by the legislature thereof.

"State."

"B. The Province of Ontario and the Province of Quebec, or either of them, may become states party to this compact by taking such action as their laws and the laws of the Government of Canada may prescribe for adherence thereto. For the purpose of this compact the word 'state' shall be construed to include a Province of Canada.

"ARTICLE III

"The Great Lakes Commission created by Article IV of this compact shall exercise its powers and perform its functions in respect to the Basin which, for the purposes of this

compact, shall consist of so much of the following as may be within the party states:

"1. Lakes Erie, Huron, Michigan, Ontario, St. Clair, Superior, and the St. Lawrence River, together with any and all natural or man-made water interconnections between or among them.

"2. All rivers, ponds, lakes, streams, and other watercourses which, in their natural state or in their prevailing conditions, are tributary to Lakes Erie, Huron, Michigan, Ontario, St. Clair, and Superior or any of them or which comprise part of any watershed draining into any of said lakes.

"ARTICLE IV

Great Lakes Commission. Establishment. Seal.

"A. There is hereby created an agency of the party states to be known as The Great Lakes Commission (hereinafter called the Commission). In that name the Commission may sue and be sued, acquire, hold and convey real and personal property and any interest therein. The Commission shall have a seal with the words 'The Great Lakes Commission' and such other design as it may prescribe engraved thereon by which it shall authenticate its proceedings. Transactions involving real or personal property shall conform to the laws of the state in which the property is located, and the Commission may by by-laws provide for the execution and acknowledgement of all instruments in its behalf.

Personnel.

"B. The Commission shall be composed of not less than three commissioners nor more than five commissioners from each party state designated or appointed in accordance with the law of the state which they represent and serving and subject to removal in accordance with such law.

"C. Each state delegation shall be entitled to three votes in the Commission. The presence of commissioners from a majority of the party states shall constitute a quorum for the transaction of business at any meeting of the Commission. Actions of the Commission shall be by a majority of the votes cast except that any recommendations made pursuant to Article VI of this compact shall require an affirmative vote of not less than a majority of the votes cast from each of a majority of the states present and voting.

"D. The commissioners of any two or more party states may meet separately to consider problems of particular interest to their states but no action taken at any such meeting shall be deemed an action of the Commission unless and until the Commission shall specifically approve the same.

"E. In the absence of any commissioner, his vote may be cast by another representative or commissioner of his state provided that said commissioner or other representative casting said vote shall have a written proxy in proper form as may be required by the Commission.

Election of officers. Executive Director, appoint. Duties.

"F. The Commission shall elect annually from among its members a chairman and vice-chairman. The Commission shall appoint an Executive Director who shall also act as secretary-treasurer, and who shall be bonded in such amount as the Commission may require. The Executive Director shall serve at the pleasure of the Commission and at such compensation and under such terms and conditions as may be fixed by it. The Executive Director shall be custodian of the records of the Commission with authority to affix the Commission's official seal and to attest to and certify such records or copies thereof.

"G. The Executive Director, subject to the approval of the Commission in such cases as its by-laws may provide, shall appoint and remove or discharge such personnel as may be necessary for the performance of the Commission's function. Subject to the aforesaid approval, the Executive Director may fix their compensation, define their duties, and require bonds of such of them as the Commission may designate.

"H. The Executive Director, on behalf of, as trustee for, and with the approval of the Commission, may borrow, accept, or contract for the services of personnel from any state or government or any subdivision or agency thereof, from any inter-governmental agency, or from any institution, person, firm or corporation; and may accept for any of the Commission's purposes and functions under this compact any and all donations, gifts, and grants of money, equipment, supplies, materials, and services from any state or government or any subdivision or agency thereof or inter-governmental agency or from any institution, person, firm or corporation and may receive and utilize the same.

Office maintenance.

"I. The Commission may establish and maintain one or more offices for the transacting of its business and for such purposes the Executive Director, on behalf of, as trustee for, and with the approval of the Commission, may acquire, hold and dispose of real and personal property necessary to the performance of its functions.

"J. No tax levied or imposed by any party state or any political subdivision thereof shall be deemed to apply to property, transactions, or income of the Commission.

"K. The Commission may adopt, amend and rescind by-laws, rules and regulations for the conduct of its business.

"L. The organization meeting of the Commission shall be held within six months from the effective date of the compact.

Information, availability.

"M. The Commission and its Executive Director shall make available to the party states any information within its possession and shall always provide free access to its records by duly authorized representatives of such party states.

Reports.

"N. The Commission shall keep a written record of its meetings and proceedings and shall annually make a report thereof to be submitted to the duly designated official of each party state.

"O. The Commission shall make and transmit annually to the legislature and Governor of each party state a report covering the activities of the Commission for the preceding year and embodying such recommendations as may have been adopted by the Commission. The Commission may issue such additional reports as it may deem desirable.

"ARTICLE V

"A. The members of the Commission shall serve without compensation, but the expenses of each commissioner shall be met by the state which he represents in accordance with the law of that state. All other expenses incurred by the Commission in the course of exercising the powers conferred upon it by this compact, unless met in some other manner specifically provided by this compact, shall be paid by the Commission out of its own funds.

Budget.

"B. The Commission shall submit to the executive head or designated officer of each party state a budget of its estimated expenditures for such period as may be required by the laws of that state for presentation to the legislature thereof.

"C. Each of the Commission's budgets of estimated expenditures shall contain specific recommendations of the amount or amounts to be appropriated by each of the party

states. Detailed commission budgets shall be recommended by a majority of the votes cast, and the costs shall be allocated equitably among the party states in accordance with their respective interests.

"D. The Commission shall not pledge the credit of any party state. The Commission may meet any of its obligations in whole or in part with funds available to it under Article IV(H) of this compact, provided that the Commission takes specific action setting aside such funds prior to the incurring of any obligations to be met in whole or in part in this manner. Except where the Commission makes use of funds available to it under Article IV(H) hereof, the Commission shall not incur any obligations prior to the allotment of funds by the party states adequate to meet the same.

Recordkeeping.

"E. The Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Commission shall be subject to the audit and accounting procedures established under the by-laws. However, all receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified public accountant and the report of the audit shall be included in and become a part of the annual report of the Commission.

"F. The accounts of the Commission shall be open at any reasonable time for inspection by such agency, representative or representatives of the party states as may be duly constituted for that purpose and by others who may be authorized by the Commission.

"ARTICLE VI

Powers.

"The Commission shall have power to:

"A. Collect, correlate, interpret, and report on data relating to the water resources and the use thereof in the Basin or any portion thereof.

"B. Recommend methods for the orderly, efficient, and balanced development, use and conservation of the water resources of the Basin or any portion thereof to the party states and to any other governments or agencies having interests in or jurisdiction over the Basin or any portion thereof.

"C. Consider the need for and desirability of public works and improvements relating to the water resources in the Basin or any portion thereof.

"D. Consider means of improving navigation and port facilities in the Basin or any portion thereof.

"E. Consider means of improving and maintaining the fisheries of the Basin or any portion thereof.

"F. Recommend policies relating to water resources including the institution and alteration of flood plain and other zoning laws, ordinances and regulations.

"G. Recommend uniform or other laws, ordinances, or regulations relating to the development, use and conservation of the Basin's water resources to the party states or any of them and to other governments, political subdivisions, agencies or inter-governmental bodies having interests in or jurisdiction sufficient to affect conditions in the Basin or any portion thereof.

"H. Consider and recommend amendments or agreements supplementary to this compact to the party states or any of them, and assist in the formulation and drafting of such amendments or supplementary agreements.

"I. Prepare and publish reports, bulletins, and publications appropriate to this work and fix reasonable sales prices therefor.

"J. With respect to the water resources of the Basin or any portion thereof, recommend agreements between the governments of the United States and Canada.

36 Stat. 2454.

"K. Recommend mutual arrangements expressed by concurrent or reciprocal legislation on the part of Congress

and the Parliament of Canada including but not limited to such agreements and mutual arrangements as are provided for by Article XIII of the Treaty of 1909 Relating to Boundary Waters and Questions Arising Between the United States and Canada. (Treaty Series, No. 548).

"L. Cooperate with the governments of the United States and of Canada, the party states and any public or private agencies or bodies having interests in or jurisdiction sufficient to affect the Basin or any portion thereof.

"M. At the request of the United States, or in the event that a Province shall be a party state, at the request of the Government of Canada, assist in the negotiation and formulation of any treaty or other mutual arrangement or agreement between the United States and Canada with reference to the Basin or any portion thereof.

"N. Make any recommendation and do all things necessary and proper to carry out the powers conferred upon the Commission by this compact, provided that no action of the Commission shall have the force of law in, or be binding upon, any party state.

"ARTICLE VII

"Each party state agrees to consider the action the Commission recommends in respect to:

"A. Stabilization of lake levels.

"B. Measures for combating pollution, beach erosion, floods and shore inundation.

"C. Uniformity in navigation regulations within the constitutional powers of the states.

"D. Proposed navigation aids and improvements.

"E. Uniformity or effective coordinating action in fishing laws and regulations and cooperative action to eradicate destructive and parasitical forces endangering the fisheries, wildlife and other water resources.

"F. Suitable hydroelectric power developments.

"G. Cooperative programs for control of soil and bank erosion for the general improvement of the Basin.

"H. Diversion of waters from and into the Basin.

"I. Other measures the Commission may recommend to the states pursuant to Article VI of this compact.

"ARTICLE VIII

"This compact shall continue in force and remain binding upon each party state until renounced by the act of the legislature of such state, in such form and manner as it may choose and as may be valid and effective to repeal a statute of said state, provided that such renunciation shall not become effective until six months after notice of such action shall have been officially communicated in writing to the executive head of the other party states.

"ARTICLE IX

"It is intended that the provisions of this compact shall be reasonably and liberally construed to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any party state or of the United States, or in the case of a Province, to the British North America Act of 1867 as amended, or the applicability thereof to any state, agency, person or circumstance is held invalid, the constitutionality of the remainder of this compact and the applicability thereof to any state, agency, person or circumstance shall not be affected thereby, provided further that if this compact shall be held contrary to the constitution of the United States, or in the case of a Province, to the British North America Act of 1867 as amended, or of any party state, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters."

Report to Congress and President.

SEC. 2. The consent herein granted does not extend to paragraph B of article II or to paragraphs J, K, and M of article VI of the compact, or to other provisions of article VI of the compact which purport to authorize recommendations to, or cooperation with, any foreign or international governments, political subdivisions, agencies or bodies. In carrying out its functions under this Act the Commission shall be solely a consultative and recommendatory agency which will cooperate with the agencies of the United States. It shall furnish to the Congress and to the President, or to any official designated by the President, copies of its reports submitted to the party states pursuant to paragraph O of article IV of the compact.

79 Stat. 246.
42 USC 1962b-1962b-6

SEC. 3. Nothing contained in this Act or in the compact consented to hereby shall be construed to affect the jurisdiction, powers, or prerogatives of any department, agency, or officer of the United States Government or of the Great Lakes Basin Committee established under title II of the Water Resources Planning Act, or of any international commission or agency over or in the Great Lakes Basin or any portion thereof, nor shall anything contained herein be construed to establish an international agency or to limit or affect in any way the exercise of the treatymaking power or any other power or right of the United States.

SEC. 4. The right to alter, or repeal this Act is expressly reserved.

Approved July 24, 1968.

LEGISLATIVE HISTORY:
HOUSE REPORT No. 1640 (Comm. on Foreign Affairs).
SENATE REPORT No. 1178 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 114 (1968):
June 12: Considered and passed Senate.
July 15: Considered and passed House.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 49 Original

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WILLIAM J. SCOTT, Attorney General of Illinois, *Plaintiff,*

vs.

CITY OF MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

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CITY OF SOUTH MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, a municipality existing under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, *Defendants.*

BRIEF OF METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 49 Original

STATE OF ILLINOIS, ex rel,
WILLIAM J. SCOTT, Attorney General of Illinois, *Plaintiff,*

vs.

CITY OF MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF KENOSHA, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF RACINE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF SOUTH MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, a municipality existing under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, *Defendants.*

BRIEF OF METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE

This memorandum is submitted in response to the question:

WOULD FEDERAL OR STATE LAW GOVERN THE SUBSTANTIVE ISSUES SOUGHT TO BE PRESENTED IN ORIGINAL ACTIONS SUCH AS THIS ONE?

INTRODUCTION

The choice of law question in this case is largely settled by federal legislation and prior decision of this Court. Federal legislation is applicable which provides for dual federal-state jurisdiction and gives federal recognition and status to state law. Thus, the answer to the specific question posed is that both federal and state law apply to the substantive issues, the state law being made applicable by the federal law. To any extent that this law is insufficient to deal with the case, federal common law would apply. This general application is true for both the determination of the existence of a cause of action and the formulation of a remedy if any is found to be necessary.

FEDERAL COMMON LAW.

There is a substantial body of law established through prior decision of this Court in interstate water allocation cases which has been referred to as "federal common law" and which has applied to such cases. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

The basic principle of this body of law is the "doctrine of equitable apportionment." First announced in *Kansas v. Colorado,* 206 U.S. 46, 95-105 (1907) discussed in *Colorado v. Kansas,* 320 U.S. 383, 384, 385 (1943), this doctrine has been consistently applied irrespective of the laws of the states involved. Even in cases such as this where both states follow the "riparian rights" theory of water law, the doctrine of equitable apportionment has been held to control over state law. *Connecticut v. Massachusetts,* 282 U.S. 660, 669-70 (1931). State law

has been applied only in relatively simple cases when the court was satisfied that the law of the states involved was sufficiently similar and adequate to be an equitable apportionment. *Wyoming v. Colorado*, 259 U.S. 419, 470 (1922). Consistently, this Court has declined to involve itself in the internal administration of its allocations, rather making general allocations between the states involved on such basis as it is able to establish shares. *Kansas v. Colorado*, supra; *Connecticut v. Massachuseits*, supra; *New Jersey v. New York*, 283 U.S. 336 (1931); *Wyoming v. Colorado*, supra; *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wisconsin v. Illinois*, 388 U.S. 426.

This Court has a well established rule against interference in interstate water rights disputes unless the plaintiff can establish by clear and convincing evidence the justness and serious importance of its claim. *Missouri v. Illinois*, 200 U.S. 496; *New York v. New Jersey*, 256 U.S. 296; *Connecticut v. Massachusetts*, 282 U.S. 660.

FEDERAL-STATE LEGAL RELATIONSHIP.

Where Congress has provided a statutory method of apportionment, this Court has held that such statutory procedures control over even the doctrine of equitable apportionment. *Arizona v. California*, 373 U.S. 546, 552-62, 583-85 (1963).

The states have been said to have a "traditional jurisdiction" over interstate or federally navigable waters, which is subject to the admittedly superior commerce power of the federal government. *First Iowa Hydro-Elec. Coop. v. Federal Power Commission*, 328 U.S. 152

(1946). The Pelton Dam case established a similar federal-state legal relationship under the federal proprietary power. *Federal Power Commission v. Oregon,* 349 U.S. 435 (1955). The power of the federal government to impose upon a state its water resource management plans based upon balancing general federal or regional interests against state or local interests was established in *Oklahoma, ex rel, Phillips v. Guy F. Atkinson Co.,* 313 U.S. 508 (1941). Congress may use less than all its powers and elect to provide a role in its plans for state created rights and duties. *United States v. Gerlach Livestock Company,* 339 U.S. 725 (1950). See also *Arizona v. California,* supra, 585, 588.

FEDERAL STATUTORY LAW.

Congress has established a statutory method for regulating the quality of interstate waters. 33 U.S.C. 1151 et seq. The method is most succinctly described by the statement of Congressional intent:

> "In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the prevention and control of water pollution, it is declared to be the policy of Congress to recognize, preserve and protect the primary responsibilities and rights of the states in preventing and controlling water pollution and to provide federal technical services and financial aid to state and interstate agencies and to municipalities in connection with the prevention and control of water pollution." 33 U.S.C. 1151(b).

Control of water quality is in effect governmental use allocation because the controls limit the uses which may be made of the water. This is particularly relevant to

the present case wherein the use being challenged is the use of Lower Lake Michigan by defendants for assimilation and disposal of municipal sewage treatment plant effluent. That this is a necessary and valuable use of natural waters cannot be questioned. Only the manner in which such use is conducted by defendants is in question.

The federal statutes contemplate an integrated federal-state effort, particularly as to municipal sewage disposal. The principal elements of the Congressional policy are:

1. Regulation by the states subject to federal criteria by requiring the states to adopt water quality standards and an enforcement plan for interstate waters under their jurisdiction which must satisfy the Federal Environmental Protection Agency (formerly Secretary of the Interior) and obtain federal approval. 33 U.S.C. 1160 (a) (k).

2. Federal investment in new municipal treatment facilities by grants to municipalities for facilities meeting federal and state approval with additional incentive for analogous state financial aid programs. 33 U.S.C. 1158.

3. Federal investment in state regulatory capability by grants to state and interstate water pollution control agencies for federally approved enforcement efforts. 33 U.S.C. 1157.

4. Federal investment to improve technology and acquire essential scientific data. 33 U.S.C. 1155-56.

It does not take much analysis of this legislation to see that it is premised on the "carrot and stick" approach. It is difficult to assign relative importance to particular

components but the leverage available through administration of federal financial assistance must at least approximate that of the regulatory component.

Because of the approach taken, the rate of construction of new treatment facilities is a function of the availability of federal grant funds. The centralization of functions and the coordination of the effort permit the regulatory agencies to consider this factor in their enforcement plans. A problem arises in that the federal legislation contemplates execution of Congressional policy by a rather large and specialized administrative agency using administrative procedures to coordinate federal-state investment with federal-state enforcement. Thus, while it provides the controlling law, that law does not lend itself well to judicial application in the format of bilateral litigation.

Wisconsin had its water quality standards, which included Lake Michigan, and its enforcement plan approved on January 27, 1968. NR 102-103, *Wis. Admin. Code,* Appendix A. It enacted implementing legislation in response to the enactment of federal law in 1966. Ch. 144, *Wisconsin Statutes* (1969), Appendix B. The federal act provides that upon approval, ". . . such state criteria and plan shall thereafter be the water quality standards and applicable to such interstate waters . . ." 33 U.S.C. 1160(c)(1). The definition of pollution contained in the federal statutes is very specific:

> "The discharge of matter into such interstate waters or portions thereof, which reduces the quality of such waters below the water quality standards established under this subsection . . ." 33 U.S.C. 1160 (c)(5).

Perhaps it would be of value to the Court to briefly review events relating to the Metropolitan Sewerage District of the County of Milwaukee of which defendants, Metropolitan Sewerage Commission of the County of Milwaukee and the Sewerage Commission of the City of Milwaukee, are components.

The district is currently under orders issued by the Wisconsin Department of Natural Resources pursuant to its water quality standards and enforcement plan, as well as the Lake Michigan Enforcement Conference, also a creature of federal legislation, 33 U.S.C. 1160. Continuous disinfection of treatment plant effluent is now operative at both district plants. Adequate treatment facilities for normal flows are available at one plant. Primary treatment is operative at the other and treatment facilities in full compliance with the orders are under construction and will be operative sometime in 1972. A huge collection system is under construction which ultimately will eliminate the problems caused by unusual peak inflows by providing storage and timed release capability, as well as the capability to allocate sewage inflow between the two plants.

All of this takes time to accomplish, as well as huge amounts of money. The timetable has been dependent upon availability of federal and state funds, time lag in fully developing the regulatory objectives to be met (this action was commenced only three years after the Lake Michigan Enforcement Conference promulgated the agreed criteria to be met), difficulty in overcoming technological problems and a difficult geophysical situation in which to construct the new collection system.

Federal legislation provides some additional elements which are useful in determining legal criteria for this

case. The criteria by which the Administrator of the Environmental Protection Agency is directed to evaluate state water quality standards and enforcement plans (33 U.S.C. 1160(c)(1)) are stated as follows:

> "Standards of water quality established pursuant to this subsection shall be such as to protect the public health or welfare, enhance the quality of water and such standards the Administrator, the Hearing Board, or the appropriate state authority shall take into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other legitimate uses. 33 U.S.C. 1160(c)(3).

Establishment of water quality standards to protect a particular use pattern requires that the use pattern be determined before the standards can be developed. In this respect, Wisconsin and the federal government are in agreement by virtue of federal approval of Wisconsin's water quality standards and the federal-interstate agreement reached by the Lake Michigan Enforcement Conference, both of which establish the optimal use pattern for Lake Michigan to be protected. Illinois was also a party to the Lake Michigan Enforcement Conference. The uses given emphasis are municipal water supply, recreation and fishery and the policy goal of Wisconsin and the Environmental Protection Agency is to make Lake Michigan waters suitable in quality for those uses. Illinois' proposed Bill of Complaint expresses confusion on this point for it includes industrial and agricultural uses, normally requiring much lower standards, with water supply and recreation, which are at the opposite end of the spectrum. (p. 6, VI.)

The subsection empowering the United States Department of Justice to commence actions on behalf of the En-

vironmental Protection Administration to enforce its pollution abatement orders in the federal courts provides:

> "The court, giving due consideration to the practicability and to the physical and economic feasibility of securing abatement of any pollution proved, shall have jurisdiction to enter such judgment, and orders enforcing such judgment, as the public interest and the equities of the case may require." 33 U.S.C. 1160(h).

While this may approximate the Robinson-Patman Act in clarity, it suggests application of an equitable rule of reason analogous to the applications of the doctrine of equitable apportionment cases with certain enumerated factors to be considered in formulating a remedy once a cause of action is proven.

It is apparent from Illinois' reply brief that the principal area of dispute is the manner in which the waters of Lake Michigan are to be improved in quality through pollution control and abatement. It is also the area in which plaintiff's proposed Bill of Complaint is most vague. Time appears to be the principal parameter of concern.

Abatement timetables are perhaps the most politically and technically difficult elements of the program. At this stage, what should be done has been determined. How to do it and how it should be paid for become the critical issues. As indicated by the federal legislation cited above, technical and economic factors must be considered by the judiciary as well as by the regulatory agencies.

INTERGOVERNMENTAL AGREEMENT.

The final source of possible applicable legal criteria is the Statement of Agreement resulting from the Lake

Michigan Enforcement Conference. This has been referred to previously, but in a somewhat different context.

The Water Quality Act of 1965 gave the transcript of such proceedings mandatory status as admissible evidence. 33 U.S.C. 1160(h). That subsection contemplates federal enforcement action and is silent as to the force and effect to be given an agreement entered into by the states involved and the Environmental Protection Agency. Other sections of the Act permit and even encourage interstate cooperative arrangements and provide for broad prior Congressional consent to such arrangements. 33 U.S.C. 1154. Whether this is sufficient to afford the status of interstate compact to such arrangements is far from clear. 33 U.S.C. 1154(b). However, this court has repeatedly encouraged the use of such arrangements as a superior method of resolving interstate water rights controversies. *Missouri v. Illinois,* 200 U.S. 496; *New York v. New Jersey,* 256 U.S. 296; *Colorado v. Kansas,* 320 U.S. 383; *Arizona v. California,* 373 U.S. 546; *Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92. If nothing else, it would be somewhat inequitable to permit Illinois to tell the Environmental Protection Administration that one set of criteria is acceptable and then tell this Court something else must apply, particularly considering the fact that the Metropolitan Sewerage District of the County of Milwaukee is completing a new treatment plant designed to meet the Lake Michigan Enforcement Conference criteria.

CONCLUSION.

Regulation of interstate waters to obtain optimal use is a complex and political matter. Many causal relationships between introduction of certain wastes and after

utility of the water are not known. To undertake such a project in terms of "ecology", a word which escapes concrete definition and which is a word *not* found in 33 U.S.C. 1160, simply cannot be done within the format of bilateral litigation. To determine what the ecology of Lake Michigan ought to be as plaintiff invites would require the Court to assume the role of a regional planning agency the likes of which does not exist anywhere in this country.

To analyze the case in terms of the parameters established by federal legislation and the implementing law of the states would largely require duplication of the work of the Environmental Protection Administration. At one time, this Court could engage itself in the science of bacteriology (*Missouri v. Illinois,* supra), however, we question whether that is so today. *Ohio v. Wyandotte Chemical Corp.,* 401 U.S. 493 (1971).

We suggest that an analogue of the approach used by this Court in *New York v. New Jersey,* 256 U.S. 296 (1920) has merit. New York was concerned about a proposed New Jersey sewage disposal system polluting Upper New York Bay and brought a similar action. The federal government intervened and a stipulation was negotiated between New Jersey and the Corps. of Engineers, providing for specific treatment results and providing for future operation to the satisfaction of the federal government in the event the stipulated treatment became inadequate. New York was not satisfied and the case went forward. The Court gave significant weight to the stipulation and particularly its provision for continuing administration. The extraordinary plaintiff's burden established in *Missouri v. Illinois,* 200 U.S. 496 was applied to New York's contention that the federal-New

Jersey settlement would not adequately protect the interests of New York.

The Court held New York's proof insufficient. In doing so, it gave considerable significance to the fact that New York municipalities utilized comparable treatment methods (256 U.S. 311) and that the federal-state agreement provided for continuing administration and control (256 U.S. 313). The technique of looking to what the plaintiff state permits as a standard to which a defendant may appeal was also used in *Missouri v. Illinois,* 200 U.S. 496, 522.

We submit that in the event that jurisdiction over the proposed action is accepted, that Illinois be required to establish by clear and convincing evidence that it is requesting no more of these defendants than is required by it of its own municipalities and that the present federal-state regulatory arrangement is in some specific manner insufficient to protect the interests of Illinois considering the power of continuing federal administration prior to proceeding with the cases on the merits against particular defendants and that the federal government be requested to intervene as a party in such preliminary proceedings.

The proposed Bill of Complaint makes no mention of the existence of federal regulation. Consequently, an amended bill should be required.

Respectfully submitted,
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Metropolitan Sewerage Commission of the County of Milwaukee

By Ewald L. Moerke, Jr.
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APPENDIX A

NATURAL RESOURCES

Chapter NR 102

WATER QUALITY STANDARDS FOR INTERSTATE WATERS

NR 102.01 Guidelines for application of standards
NR 102.02 Categories of standards
NR 102.03 Enforcement

NR 102.01 Guidelines for application of standards. (1) Water used for hydropower and commercial shipping depends mainly on quantity, depth and elevation; consequently, no specific quality standards for these uses have been prepared. The minimum standards apply to these as well as to waters for wildlife and stock watering supply, irrigation and waste assimilation.

(2) Where 2 or more uses are designated in one water sector, the more exacting standard will apply. As an example, if the maximum permissible concentration of a substance in a water used for public supply is higher than allowable for fish and and other aquatic life, and both of these uses are involved in one sector, then the allowable concentration cannot exceed that for fish and aquatic life.

(3) Test procedures shall conform with "Standard Methods for the Examination of Water and Wastewater," 12th Edition, 1965, prepared and edited by the American Public Health Association, American Waterworks Association and Water Pollution Control Federation, or by other methods acceptable to the department of natural resources and not contrary to the requirements of the federal government. The U. S. Atomic Energy Commission Rules and Regulations, Title 10, Part 20, Standards for Protection Against Radiation, December 22, 1965, will apply to the disposal and permissible concentrations of radioactive substances.

Note: Copies of the above publications are available for inspection at the office of the department of natural resources, secretary of state's office and the office of the revisor of statutes, and may be obtained for personal use from American Public Health Association, Inc., 1790 Broadway, New York, N. Y. 10019, and the United States Atomic Energy Commission, Washington, D. C.

(4) Water quality standards do not assure quantity and natural quality. Available water, when used in evaluating compliance with standards, will be based on the lowest average dilution for any period of 7 consecutive days in the most recent 10 years. In evaluating compliance, determinations of water quality will be made in accordance with procedures which will assure that the designated uses of such waters are fully protected. The department may require management of waste admixture zones depending on such factors as effluent quality and quantity, available dilution, temperature, current and restrictions to the movement of fish.

(5) Application of chemicals for water resource management purposes in accordance with statutory provisions is not subject to the

requirements of the standards except in case of water used for public water supply.

Note: The standards and water use designations are subject to revision as data become available and permit objectives to be stated by methods which define the variation or distribution of values in quantitative and statistically valid terms.

History: Cr. Register, May, 1967, No. 137, eff. 6–1–67; renum. from RD 2.01 to be NR 102.01, and am. (3), Register, May, 1971, No. 185, eff. 6–1–71.

NR 102.02 Categories of standards. To preserve and enhance the quality of waters the following standards are established to govern water management decisions. It should be recognized that these standards will be revised as new information or advancing technology indicate that revisions are in the public interest.

(1) MINIMUM STANDARDS. Regardless of the water quality standards and water use, untreated or inadequately treated wastes may not impair a designated use nor may standards be interpreted to permit a lower quality within a water sector than that now existing or required by outstanding orders. As a result of municipal, industrial, commercial, domestic, agricultural, land development or other activities, conditions may arise which will be controlled by the following standards:

(a) Substances that will cause objectionable deposits on the shore or in the bed of a body of water, shall not be present in such amounts as to create a nuisance.

(b) Floating or submerged debris, oil, scum or other material shall not be present in such amounts as to create a nuisance.

(c) Materials producing color, odor, taste or unsightliness shall not be present in such amounts as to create a nuisance.

(d) Substances in concentrations or combinations which are toxic or harmful to humans shall not be present in amounts found to be of public health significance, nor shall substances be present in amounts, which by bio-assay and other appropriate tests, indicate acute or chronic levels harmful to animal, plant or aquatic life.

(2) FOR PUBLIC WATER SUPPLY. The following standards are applicable where a surface water is classified for public water supply:

(a) Bacteria. Coliform number not to exceed 5,000 per 100 ml. as a monthly arithmetic average value; nor exceed this value in more than 20 percent of the samples examined during any month; nor exceed 20,000 per 100 ml. in more than 5 percent of the samples. Counts as Most Probable Number (MPN) or Membrane Filter Coliform Counts (MFCC).

(b) Dissolved solids. Not to exceed 500 mg/1 as a monthly average value, nor exceed 750 mg/1 at any time.

(c) pH. A range from 6.0 to 9.0 except in waters naturally having a pH of less than 6.5 or higher than 8.5 where effluent discharges may not reduce the low value or increase the high value of the surface water's pH by more than 0.5 standard units.

(d) The intake water supply will be such that by appropriate treatment and adequate safeguards it will meet the Public Health Service Drinking Water Standards, 1962.

Note: Copies of Public Health Service Drinking Water Standards, 1962 are available for inspection at the office of the department of natural resources, secretary of state's office and the office of the revisor of statutes, and may be obtained for personal use from the U. S. Department of Health, Education, and Welfare, Public Health Service, Washington, D.C.

(e) Other. Concentrations of other constituents must not be hazardous to health.

(3) FOR FISH AND OTHER AQUATIC LIFE. (a) The following standards are applicable to surface waters where maintenance of fish reproduction is of primary importance in the public interest and natural conditions permit:

1. Dissolved oxygen. The dissolved oxygen content shall not be lowered to less than 80 percent of saturation nor to less than 5 mg/1 at any time. There shall be no abrupt change from natural unpolluted background by more than 1 mg/1 at any time.

2. The temperature shall not exceed 84° F. No change from natural unpolluted background by more than 5° F. at any time nor at a rate in excess of 2° F. per hour.

(b) The following standards are applicable to surface waters where fishing is desirable in conjunction with other uses and natural conditions permit:

1. For a balanced warm water fishery the dissolved oxygen content should not be less than 5.0 mg/1 during at least 16 hours of any 24-hour period, nor less than 4.0 mg/1 at any time.

2. Temperature. The temperature shall not exceed 89° F. for warm water fish. No abrupt change from background by more than 5° F. at any time. In addition, authorization must be obtained for proposed installations where the discharge of a thermal pollutant may increase the natural maximum temperature of a stream by more than 3° F.

(c) Unauthorized concentrations of substances are not permitted that alone or in combination with other materials present are toxic to fish or other aquatic life.

(d) Streams classified by law as trout waters shall not be altered from natural background by effluents that affect the stream environment to such an extent that trout populations are adversely affected in any manner.

(4) FOR RECREATIONAL USE. A sanitary survey and/or evaluation to assure protection from fecal contamination is the chief criterion in determining the suitability of a surface water for recreational use. In addition, the following bacteriological guidelines are set forth:

(a) A water is acceptable for whole body contact if it has an arithmetic average coliform count of 1,000 per 100 ml. or less and a maximum not exceeding 2,500 per 100 ml. during the recreation season.

(b) A water is acceptable for partial body contact if it has an arithmetic average coliform count of 5,000 per 100 ml. or less and with no more than 1 of the last 5 samples exceeding 20,000 per 100 ml. during the recreation season.

(c) The Membrane Filter Coliform Count (MFCC) is the preferred method for determining coliform density; provided, however, that where turbidity due to algae or other material does not permit testing of a sample volume sufficient to produce significant results, or where low coliform estimates may be caused by high numbers of noncoliforms or the presence of substances toxic to the procedure, the Most Probable Number (MPN) is to be used to determine coliform density. The average is based on the last 5 test results. A more definitive test for fecal pollution is the Membrane Filter Fecal Coliform Count (MFCC). Tests by this method are acceptable where correlation relat-

ing the count to sanitary hazards has been demonstrated. Acceptable values based on MFFCC are not shown, but may be adopted in future revisions.

(5) FOR INDUSTRIAL AND COOLING WATER USE. The following standards are applicable to surface waters designated for industrial processes and cooling purposes:

(a) Dissolved oxygen shall not be less than 2.0 mg/1 as a daily average value nor less than 1.0 at any time.

(b) Dissolved solids shall not exceed 750 mg/1 as a monthly average value, nor exceed 1,000 mg/1 at any time.

(c) pH shall range from 6.0 to 9.0 except in waters naturally having a pH of less than 6.5 or higher than 8.5 where effluent discharges may not reduce the low value or increase the high value of the surface water's pH by more than 0.5 standard units.

(d) Temperature shall not exceed 89° F. (32° C.).

History: Cr. Register, May, 1967, No. 137, eff. 6–1–67; renum. from RD 2.02 to be NR 102.02 and am. (2) (d), Register, May, 1971, No. 185, eff. 6–1–71.

NR 102.03 Enforcement. Financial assistance, industrial incentives, increased surveillance, orders and legal action will be the means used to implement and enforce the adopted water quality standards. Reasonable time schedules to comply with orders depend on the circumstances. In general, 1 year to provide disinfection, in-plant controls and minor treatment adjustments; or 2 years to install settleable solids removal facilities; or 2–3 years to complete a secondary treatment system should be adequate. Separation of excessive clear waters from sanitary sewerage systems may vary from 1 year for disconnection of roof leaders to 10 years or more where combined sanitary-storm water sewers are involved. All polluters will be required to conform to this timetable and to the annual listing of actions required to achieve the surface water quality standards adopted.

History: Cr. Register, May, 1967, No. 137, eff. 6–1–67; renum. from RD 2.03 to be NR 102.03, Register, May, 1971, No. 185, eff. 6–1–71.

NATURAL RESOURCES

Chapter NR 103

INTERSTATE WATERS--USES AND DESIGNATED STANDARDS

NR 103.01	Wisconsin–Illinois waters	NR 103.05	Wisconsin–Michigan waters
NR 103.02	Wisconsin–Minnesota–Iowa–Illinois waters	NR 103.06	Wisconsin–Michigan–Illinois–Indiana waters
NR 103.03	Wisconsin–Minnesota waters	NR 103.07	Trout waters
NR 103.04	Wisconsin–Minnesota–Michigan waters	NR 103.08	Fish reproduction
		NR 103.09	Revision of designated uses

NR 103.01 Wisconsin–Illinois waters. (1) The Des Plaines River, Piscasaw Creek, Nippersink Creek and Turtle Creek upstream of the Rock–Walworth county line are used for wildlife and stock watering, waste assimilation, warm water fishery and partial body contact recreation. Dutch Gap Canal and Trevor Creek have similar uses excepting waste assimilation. The main stems of these streams should meet the requirements for partial body contact recreation and fish and aquatic life.

(2) The Fox River is used for recreation, waste assimilation, industrial supply, fishing and irrigation. Water quality in the Fox River from the state line upstream to 5 miles below the Waukesha sewage treatment plant should have water quality suitable for all uses excepting public water supply. In the middle sector of the Fox River, which extends upstream to the Waukesha dam, water quality should meet the standards for industrial and cooling water supply and minimum conditions. Above the Waukesha dam, water quality should meet the standards for partial body contact recreation and fish and aquatic life.

(3) Benet/Shangrila, Cross and Elizabeth Lakes are located on the Wisconsin–Illinois boundary and used for fishing and recreation. Their water quality should meet the requirements for fish and other aquatic life and whole body contact recreation.

(4) The Rock River and Sugar River are used for waste assimilation, recreation, fish and aquatic life, irrigation, stock and wildlife watering and hydropower. Their waters should meet all water quality standards except public water supply.

(5) Turtle Creek below the Rock–Walworth county line, East Fork Galena River, Spafford Creek, Menomonee River, Pecatonica River and Galena River are used for recreation, stock and wildlife watering, waste assimilation and fish and aquatic life. Richland Creek and East Branch Richland Creek, Apple River and West Fork Apple River, Sinsinawa River, Little Menominee River and a tributary of the East Fork Galena River have similar uses excepting waste assimilation. Water quality of these streams should meet all standards except those for public water supply.

(6) Honey Creek is used for waste assimilation, stock and wildlife watering, recreation and fish and aquatic life. A section from the Wisconsin–Illinois state line upstream to the Clarno–Cadiz town line

should meet the requirements for whole body contact recreation and fish and aquatic life. Minimum requirements apply to the sector of Honey Creek above the Clarno–Cadiz town line.

History: Cr. Register, May, 1967, No. 137, eff. 6–1–67; renum. from RD 3.01 to be NR 103.01, Register, May, 1971, No. 185, eff. 6–1–71.

NR 103.02 Wisconsin–Minnesota–Iowa Illinois waters. The Mississippi River is used for commercial and recreational fishing, industrial and cooling water supply, boating, hunting, commercial shipping and waste assimilation. Water quality should meet all the standards and requirements except for public water supply.

History: Cr. Register, May, 1967, No. 137, eff. 6–1–67; renum. from RD 3.02 to be NR 103.02, Register, May, 1971, No. 185, eff. 6–1–71.

NR 103.03 Wisconsin–Minnesota waters. (1) The St. Croix River has high scenic and aesthetic value and is used for recreation, fishing, hydropower, commercial shipping, stock and wildlife water supply, and waste assimilation. An anticipated use involves industrial and cooling water supply. Its water quality should meet the standards and requirements for all uses.

(2) Upper Tamarack River, East Branch Hay Creek and West Branch Hay Creek are used for recreation, fishing, and stock and wildlife water supply. Their water quality should meet the requirements for recreation and fish and aquatic life.

(3) The St. Louis River adjoining Wisconsin is used for recreation, fishing, waste assimilation and commercial shipping. It is anticipated that a future use in the Lower St. Louis River will include cooling and industrial water supply. The St. Louis River water quality should meet all standards except for public water supply.

(4) Black River and Black Lake, Nemadji River and South Fork Nemadji River, Mud Creek, Clear Creek, Pokegama River and Red River are used for fishing, stock and wildlife water supply and recreation. Water quality of these streams should meet the standards and requirements for recreation and fish and aquatic life. A section of Black River is classified for trout.

History: Cr. Register, May, 1967, No. 137, eff. 6–1–67; renum. from RD 3.03 to be NR 103.03, Register, May, 1971, No. 185, eff. 6–1–71.

NR 103.04 Wisconsin–Minnesota–Michigan waters. Lake Superior is used for recreation, commercial and recreational fishing, shipping, municipal water supply, industrial and cooling water, and waste assimilation. Lake Superior open waters should meet the criteria and requirements for all water uses. Harbor areas and shoreline sections in the vicinity of pollutional outlets should meet minimum criteria plus requirements for cooling and industrial water supply. Beach waters of Lake Superior should meet the standards for whole body contact recreation.

History: Cr. Register, May, 1967, No. 137, eff. 6–1–67; renum. from RD 3.04 to be NR 103.04, Register, May, 1971, No. 185, eff. 6–1–71.

NR 103.05 Wisconsin–Michigan waters. (1) The Montreal River is used for hydropower, recreation, wildlife and stock watering, waste assimilation and has aesthetic value. Its waters should meet the quality standards and requirement for all water uses except for a sector extending from upstream limits of the city of Hurley to a point downstream five miles below the city limits where the water quality

and requirements should be suitable for partial body contact recreation and fish and aquatic life.

(2) Several waters cross the Wisconsin–Michigan line including Wester Creek, Black River tributaries, McDonald Creek tributaries, Bena Lake Inlet, Harris Creek, Moraine Creek, Oxbo Lake Inlet, Unnamed Creek between Little Presque Isle Lake and Twin Island Lake, South and East Branch Presque Isle River, tributary to Palmer Lake, Johnston Springs Outlet, Lobischer Creek and Elvoy Creek and the following lakes:

(a) Unnamed (T44N, R5E, Sec. 18)
(b) Moraine
(c) Stateline
(d) Basin
(e) Little Presque Isle
(f) Roach
(g) Tenderfoot
(h) Plum
(i) Crampton
(j) Big
(k) West Bay
(l) Mamie
(m) Big Bateau
(n) Mill
(o) Crystal
(p) Eleanor
(q) Lac Vieux Desert
(r) Norwood
(s) Smokey

Uses of these waters include fishing, recreation, aesthetic, and stock and wildlife watering. Their water quality should meet the requirements and standards for whole body contact recreation and fish and aquatic life. The Black River tributaries and Elvoy Creek are classified as trout waters.

(3) The Brule and Menominee Rivers are used for hydropower production and the latter stream is used for waste assimilation water supply. Fishing, recreation, aesthetic values and stock and wildlife watering are common to both. The Brule River is classified as a trout stream. Its water quality should meet the requirements for recreation and fish and aquatic life. Water quality requirements and standards on the Menominee River should meet the following: From a point 200 yards above M95 bridge down to Little Quinnesec Falls Dam at Niagara, the standards for fish and aquatic life, partial body contact recreation, and industrial and cooling water apply; from Niagara to the upper side of Kremlin Falls, partial body contact recreation, industrial and cooling water use, minimum, and the requirements of outstanding orders if more exacting will be in effect; in the sector from the Upper Dam at Marinette downstream to Green Bay the standards for partial body contact, fish and aquatic life, and industrial and cooling water use apply; the remainder of the stream should meet the standards for all uses excepting public water supply.

(4) Green Bay is used for public water supply, recreation, commercial and recreational fishing, industrial and cooling water, and waste assimilation. Green Bay open water should meet the water quality standards and requirements for all water uses. Swimming beach waters should meet the standards for body contact recreation. Harbor areas and shoreline sections in the vicinity of pollutional outlets and in areas influenced by the discharges of the Oconto, Peshtigo, Menominee and Fox Rivers should meet minimum water quality standards and the requirements for cooling and industrial water supply.

History: Cr. Register, May, 1967, No. 137, eff. 6–1–67, renum. from RD 3.05 to be NR 103.05, Register, May, 1971, No. 185, eff. 6–1–71.

NR 103.06 Wisconsin–Michigan–Illinois–Indiana waters. Lake Michigan is used for recreation, commercial and recreational fishing, shipping, public water supply, waste assimilation, and industrial and cooling water. Lake Michigan open waters should meet the water quality standards and requirements for all water uses. Swimming beach waters should meet the standards for body contact recreation. Harbor areas and shoreline sections in the vicinity of pollutional outlets should meet minimum water quality standards and the requirements for cooling and industrial water supply.

History: Cr. Register, May, 1967, No. 137, eff. 6–1–67; renum. from RD 3.06 to be NR 103.06, Register, May, 1971, No. 185, eff. 6–1–71.

NR 103.07 Trout waters. Trout waters include the open waters of Lakes Superior and Michigan as well as those classified by law. They must be given special protection as required by the fish and aquatic life standards.

History: Cr. Register, May, 1967, No. 137, eff. 6–1–67; renum. from RD 3.07 to be NR 103.07, Register, May, 1971, No. 185, eff. 6–1–71.

NR 103.08 Fish reproduction. Standards adequate to maintain fish reproduction shall be maintained in the open waters of Lake Superior and Lake Michigan and in all other interstate waters which are designated by the department as of primary importance in the public interest for the maintenance of fish reproduction.

History: Cr. Register, May, 1967, No. 137, eff. 6–1–67; renum. from RD 3.08 to be NR 103.08 and am., Register, May, 1971, No. 185, eff. 6–1–71.

NR 103.09 Revision of designated uses. Modification of the uses and designated standards established in this chapter may be initiated by the department, by petition of any interested person, or by the resource development board, subject to the provisions of chapter 227, Wis. Stats.

History: Cr. Register, May, 1967, No. 137, eff. 6–1–67; renum. from RD 3.09 to be NR 103.09, Register, May, 1971, No. 185, eff. 6–1–71.

APPENDIX B

CHAPTER 144

WATER, ICE, SEWAGE AND REFUSE

144.01 Definitions. The following terms as used in this chapter mean:

(1) "Waters of the state" includes those portions of Lake Michigan and Lake Superior within the boundaries of Wisconsin, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface or ground water, natural or artificial, public or private, within the state or its jurisdiction.

(2) "Sewage," the water carried wastes created in and to be conducted away from residences, industrial establishments, and public buildings as defined in s. 101.01 of the statutes, with such surface or ground water as may be present.

(3) "Waterworks," or "water system," all structures, conduits and appurtenances by means of which water is delivered to consumers except piping and fixtures inside buildings served, and service pipes from building to street main.

(4) "Water supply," the sources and their surroundings from which water is supplied for drinking or domestic purposes.

(5) "Sewerage system," all structures, conduits and pipe lines by which sewage is collected and disposed of, except plumbing inside and in connection with buildings served, and service pipes from building to street main.

(6) "System or plant" includes water and sewerage systems and sewage and refuse disposal plants.

(7) "Refuse," all matters produced from industrial or community life, subject to decomposition, not defined as sewage.

(8) "Owner," the state, county, town, town sanitary district, city, village, metropolitan sewerage district, corporation, firm, company, institution or individual owning or operating any water supply, sewerage or water system or sewage and refuse disposal plant.

(9) "Industrial wastes" include liquid or other wastes resulting from any process of industry, manufacture, trade or business or the development of any natural resource.

(10) "Other wastes" include all other substances, except industrial wastes and sewage, as the latter term is defined in s. 144.01, which pollute any of the surface waters of the state. The term also includes "unnecessary siltation" resulting from operations such as the washing of vegetables or raw food products, gravel washing, stripping of lands for development of subdivisions, highways, quarries and gravel pits, mine drainage, cleaning of vehicles or barges or gross neglect of land erosion.

(11) "Pollution" includes contaminating or rendering unclean or impure the waters of the state, or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life.

(12) "Municipality", any city, town, village, county, county utility district, town sanitary district or metropolitan sewage district.

(13) "Nonprofit-sharing corporation", a nonstock corporation organized under ch. 181 or corresponding prior general corporation laws.

(14) "Department", the department of natural resources.

(15) "Secretary", the secretary of natural resources.

144.025 Department of natural resources—water resources. (1) STATEMENT OF POLICY AND PURPOSE. The department of natural resources shall serve as the central unit of state government to protect, maintain and improve the quality and management of the wa-

ters of the state, ground and surface, public and private. Continued pollution of the waters of the state has aroused widespread public concern. It endangers public health and threatens the general welfare. A comprehensive action program directed at all present and potential sources of water pollution whether home, farm, recreational, municipal, industrial or commercial is needed to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water. The purpose of this act is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. To the end that these vital purposes may be accomplished, this act and all rules and orders promulgated pursuant thereto shall be liberally construed in favor of the policy objectives set forth in this act. In order to achieve the policy objectives of this act, it is the express policy of the state to mobilize governmental effort and resources at all levels, state, federal and local, allocating such effort and resources to accomplish the greatest result for the people of the state as a whole. Because of the importance of Lakes Superior and Michigan and Green Bay as vast water resource reservoirs, water quality standards for those rivers emptying into Lakes Superior and Michigan and Green Bay shall be as high as is practicable.

(2) POWERS AND DUTIES. (a) The department shall have general supervision and control over the waters of the state. It shall formulate no later than July 1, 1968, a long-range, comprehensive state water resources plan for each region, as fixed by the department under sub. (4), to guide the development, management and protection of water resources. Such plan shall thereafter be carried out by the department. Such plan shall be reviewed and projected by the department every 2 years and a report thereon submitted to the governor by September 1 of each odd-numbered year. The department also shall formulate plans and programs for the prevention and abatement of water pollution and for the maintenance and improvement of water quality.

(b) The department shall adopt rules setting standards of water quality to be applicable to the waters of the state, recognizing that different standards may be required for different waters or portions thereof. Such standards of quality shall be such as to protect the public interest, which include the protection of the public health and welfare and the present and prospective future use of such waters for public and private water supplies, propagation of fish and aquatic life and wildlife, domestic and recreational purposes and agricultural, commercial, industrial and other legitimate uses. In all cases where the potential uses of water are in conflict, water quality standards shall be interpreted to protect the general public interest.

(c) The department may issue general orders, and adopt rules applicable throughout the state for the construction, installation, use and operation of practicable and available systems, methods and means for preventing and abating pollution of the waters of the state. Such general orders and rules shall be issued only after an opportunity to be heard thereon has been afforded to interested parties.

(d) 1. The department may issue special orders directing particular owners to secure such operating results toward the control of pollution of the waters of the state as the department prescribes, within a specified time. Pending efforts to comply with any order, the department may permit continuance of operations on such conditions as it prescribes. If any owner cannot comply with an order within the time specified, he may, before the date set in the order, petition the department to modify the order. The department may modify the order, specifying in writing the reasons therefor. If any order is not complied with within the time period specified, the department shall immediately notify the attorney general of this fact. Within 30 days thereafter, the attorney general shall forthwith commence an action under s. 144.536.

2. The department may issue temporary emergency orders without prior hearing when the department determines that the protection of the public health necessitates such immediate action. Such emergency orders shall take effect at such time as the department determines. As

soon as is practicable, the department shall hold a public hearing after which it may modify or rescind the temporary emergency order or issue a special order under subd. 1.

(e) No wells shall be constructed, installed or operated to withdraw water from underground sources for any purpose where the capacity and rate of withdrawal of all wells on one property is in excess of 100,000 gallons a day without first obtaining the approval of the department. If the department finds that the proposed withdrawal will adversely affect or reduce the availability of water to any public utility in furnishing water to or for the public it shall either withhold its approval or grant a limited approval under which it imposes such conditions as to location, depth, pumping capacity, rate of flow and ultimate use so that the water supply of any public utility engaged in furnishing water to or for the public will not be impaired. The department may issue such general or special orders as it deems necessary to insure prompt and effective administration of this paragraph.

(f) The department shall make investigations and inspections to insure compliance with any general or special order or rule which it issues. In the exercise of this power the department may require the submission and approval of plans for the installation of systems and devices for handling, treating or disposing of any wastes.

(g) The department may conduct scientific experiments, investigations, waste treatment demonstrations and research on any matter under its jurisdiction. It may establish pilot plants, prototypes and facilities in connection therewith and lease or purchase land or equipment.

(h) The department, upon request, and without charge for service or expense, shall consult with and advise owners having installed or about to install systems or plants, as to the most appropriate water supply and the best method of providing for its purity, or as to the best method of disposing of sewage or refuse, with reference to the existing and future needs of all communities or persons which may be affected thereby. The department shall not be required to prepare plans.

(i) The department shall supervise chemical treatment of waters for the suppression of algae, aquatic weeds, swimmers' itch and other nuisance-producing plants and organisms. It may purchase equipment and may make a charge for the use of the same and for materials furnished, together with a per diem charge for any services performed in such work. The charge shall be sufficient to reimburse the department for the use of the equipment, the actual cost of materials furnished, and the actual cost of the services rendered plus 10% for overhead and development work.

(j) The department may enter into agreements with the responsible authorities of other states, subject to approval by the governor, relative to methods, means and measures to be employed to control pollution of any interstate streams and other waters and to carry out such agreement by appropriate general and special orders. This power shall not be deemed to extend to the modification of any agreement with any other state concluded by direct legislative act, but, unless otherwise expressly provided, the department shall be the agency for the enforcement of any such legislative agreement.

(k) The department may order or cause the abatement of any nuisance affecting the waters of the state under ss. 146.13 and 146.14.

(l) The department shall by rule establish an examining program for the certification of waterworks and sewage treatment plant operators, setting such standards as the department finds necessary to accomplish the purposes of this chapter, and may charge applicants for such certificates for the cost of examination. After January 1, 1969, no person shall operate a waterworks or sewage treatment plant unless he holds a valid certificate issued under this paragraph.

(m) Orders issued by the department shall be signed by the person designated by the board.

(n) The department may accept gifts and grants from any private or public source for any purpose under its jurisdiction and may expend or use such gifts and grants for the purposes for which received.

(p) Beginning January 1, 1967, any provision of the state plumbing code which sets specifications for septic tanks and their installation shall be void unless it has been approved by the department.

(q) The department may prohibit the installation or use of septic tanks in any area of the state where the department finds that the use of septic tanks would impair water quality. The department shall prescribe alternate methods for waste treatment and disposal in such prohibited areas.

(r) If the department finds that a system or plant tends to create a nuisance or menace to health or comfort, it shall order the owner or the person in charge to secure such operating results as the department prescribes, within a specified time. If the order is not complied with, the department may order designated changes in operation, and if necessary, alterations or extension to the system or plant, or a new system or plant. If the department finds that the absence of a municipal system or plant tends to create a nuisance or menace to health or comfort, it may order the city, village, town or town sanitary district embracing the area where such conditions exist to prepare and file complete plans of a corrective system as provided by s. 144.04, and to construct such system within a specified time.

(s) In cases of noncompliance with any order issued under par. (d) or (r), the department may take the action directed by the order, and collect the costs thereof from the owner to whom the order was directed. The department shall have all the necessary powers needed to carry out this paragraph including powers granted municipalities under ss. 66.076 and 66.201 to 66.209. It shall also be eligible for financial assistance under s. 144.21.

(3) WATER RESOURCES COUNCIL. The water resources council shall advise the department on the setting of water quality standards and other state water problems.

(4) REGIONS. By January 1, 1967, the department shall divide the state into not more than 12 regions on the basis of criteria established by the department, taking into consideration such factors as river basins, watersheds, population density, economic factors, regional planning commissions and geographic, geologic and topographic features, and designate for each region a departmental employe as the regional director to administer the local work of the department in that region.

(5) REGIONAL BOARDS. (a) There shall be a regional water resources board for each region composed of the regional director, who shall serve as executive secretary; an employe of the department of health and social services serving in the region, appointed by and serving at the pleasure of the secretary of health and social services; an employe of the department of natural resources serving in the region, appointed by and serving at the pleasure of the secretary of natural resources; and 5 citizen members appointed by and serving at the pleasure of the governor. The executive director of the Minnesota-Wisconsin boundary area commission shall serve as a member for regions contiguous to the Minnesota boundary. The officers of the regional boards shall be selected from the citizen members.

(b) Each regional advisory board shall advise the department on regional water quality standards and other water problems of the region, act as liaison to the public, foster educational programs and aid in fostering the development of sanitary districts.

(c) Each regional advisory board shall meet at least semiannually and at the call of the chairman or a majority of its members.

(d) Regional advisory board members shall be reimbursed for their actual and necessary expenses by the department, but such reimbursement in the case of members who are not citizen members shall be by the employing agency.

(6) Personnel of all state agencies shall report any evidence of water pollution found by them to the department.

(7) The department shall study the feasibility of a system of effluent charges for the control of water pollution in this state and shall report thereon to the 1969 legislature at its convening.

144.21 Financial assistance program. (1) The legislature finds that state financial assistance for the construction and financing of pol-

lution prevention and abatement facilities is a public purpose and a proper state government function in that the state is trustee of the waters of the state and that such financial assistance is necessary to protect the purity of state waters.

(2) In order that the construction of pollution prevention and abatement facilities necessary to the protection of state waters be encouraged, a state program of assistance to municipalities for the financing of such facilities is established and a program of state advances in anticipation of federal aid reimbursement is established to meet the state's water quality standards. These state programs shall be administered by the department of natural resources and the department shall make such rules as are necessary for the proper execution of the state program.

(2m) In this section "estimated reasonable costs" include the costs of preliminary planning to determine the economic and engineering feasibility of pollution prevention and abatement facilities, the engineering, architectural, legal, fiscal and economic investigations and studies, surveys, designs, plans, working drawings, specifications, procedures and other action necessary to the construction of pollution prevention and abatement facilities and the erection, building, acquisition, alteration, remodeling, improvement or extension of pollution prevention and abatement facilities and the inspection and supervision of the construction of pollution prevention and abatement facilities.

(3) (a) The department shall establish criteria to determine those municipalities and projects which are eligible for the state program and to determine appropriate priorities among the projects.

(c) All municipalities are eligible for agreements under sub. (6) (a) and (b) based on the criteria in this paragraph. The criteria shall consider the health hazards of existing conditions, the extent and nature of pollution, per capita costs of the project, property valuation of the municipalities as equalized by the state, income of the residents in the municipalities, the availability of federal funds for the project, soil conditions, the feasibility and practicality of the project, the borrowing capacity of the municipality and any other factors which the department considers important. Municipalities commencing projects but not completed prior to January 18, 1970, shall be deemed eligible for agreements under sub. (6) (a) and (b).

(4) Municipalities which desire to participate in the state program shall submit application for participation to the department. The application shall be in such form and include such information as the department prescribes.

(5) The department shall review applications for participation in the state program. It shall determine those applications which meet the criteria it established under sub. (3), and shall arrange the applications in appropriate priority order.

(6) The department may enter into agreement with municipalities to provide state assistance for the financing of those pollution prevention and abatement facilities projects it approves under sub. (5).

(a) The department may enter into agreements with municipalities to make payments to municipalities from the appropriation made by s. 20.370 (5) (c) to pay not less than 25% and not more than 30% of the estimated reasonable costs of the approved project. These payments shall be in even annual amounts and shall extend for a period of not less than 5 years and not more than 30 years. The department shall not enter into such additional agreements after July 1, 1969, but shall continue to make payments on existing agreements until the terms of the agreement are fully satisfied.

(b) The department may enter into agreements with municipalities to make payments to municipalities from the appropriation made by s. 20.866 (2) (tm).

1. These payments shall not exceed 50% of the approved project in conjunction with the state program of advancement in anticipation of federal reimbursement under sub. (2). To provide for the financing of pollution prevention and abatement facilities, the natural resources board, with the approval of the governor, subject to the limits of s. 20.866 (2) (tm) may direct that state debt be contracted as set forth in subd. 2

and subject to the limits set therein. Said debts shall be contracted for in the manner and form as the legislature hereafter prescribes.

2. It is the intent of the legislature that state debt not to exceed $144 million in the 10-year period from 1969 to 1979 may be incurred for state water pollution and abatement assistance.

(c) In addition to any agreements entered into under pars. (a) and (b), the department may enter into agreements with municipalities to make payments to municipalities from the appropriation made by s. 20.370 (5) (fm) to provide direct financial assistance for smaller facilities, including but not limited to chlorination treatment and phosphate removal.

(e) The department shall review and approve the plans and specifications of all facilities designed and constructed by agreement under this section.

(11) This section shall be construed liberally in aid of the purposes declared in sub. (1).

FILED
FEB 19 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 49 Original

STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, Attorney General of Illinois,

Plaintiff,

vs.

CITY OF MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF KENOSHA, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF RACINE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF SOUTH MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, a municipality existing under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof,

Defendants.

PLAINTIFF'S BRIEF REGARDING THE APPLICABLE LAW

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THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof,

Defendants.

PLAINTIFF'S BRIEF REGARDING THE APPLICABLE LAW

This Honorable Court requested a brief on the question whether federal or state law would govern the substantive issues sought to be presented for decision in the original action involved in the instant proceedings. Plaintiff's unequivocal answer to the question posed is that *federal common law must rule the substantive issues of the case.* Sound and basic principles of legal reason viewed against the background of the constitutional history of this country mandate this answer.

THE REASONS FOR THE APPLICATION OF FEDERAL LAW.

A. The Concept of Sovereignty Involved in the Present Case Demands the Use of Federal Law.

In approaching the problem of the applicable law it must be kept in mind that the present complaint for which leave to file is sought by the State of Illinois is directed against certain Wisconsin municipalities in their capacity as political subdivisions and agencies of the State, carrying out the functions of the State in the field of public health within their boundaries. As stated by respondent, City of Kenosha, in its brief in opposition to plaintiff's motion (p. 3), the municipalities in question operate "in matters pertaining to water pollution occurring in Lake Michigan" under the jurisdiction of a State agency, the Wisconsin Department of Natural Resources. Hence the present proceedings, though pro forma brought against the municipalities causing the pollution charged, are in effect and political reality directed against the State under whose authority these municipalities operate. The complaint, therefore, must be viewed in the light of proceedings instituted by one state against the other.

The United States Constitution (Art. III, §2) invests this Court with original jurisdiction "in all Cases affecting Ambassadors, other public Ministers, and Consuls, and those in which a State shall be a Party." Thus each state —each member of the Union—is placed in the same category as are ambassadors, public ministers and consuls, in short, representatives of a foreign sovereign. The contextual linking of foreign sovereigns or those representing them with the member states of the Union was obviously not accidental but had a definite purpose. It was designed to treat foreign sovereigns and states in their sovereign capacity alike. Just as the representative of a sovereign power should be subject only to the highest judicial authority of the country, so should a state in its capacity as litigant complaining of infringement of its sovereign rights subject itself only to the country's highest judicial tribunal—a tribunal which by the constitutional plan rises above the parochial concerns and interests of the individual state. Hence, a state invoking original jurisdiction appears before this Court in matters detrimentally affecting its sovereign interests as a sovereign who should not be forced to subject "its dignity . . . to an inferior tribunal," especially if that tribunal were to determine the dispute upon the basis of local law.

This meaning of the constitutional provision is not only derived from the language and the context of the charter, but is also corroborated by the explanatory statements of the founding fathers. Alexander Hamilton in The Federalist Papers, No. 81 (Mentor Book, published by The New American Library, 1961, p. 487), speaking of the constitutional provision in question, declared that public ministers of every class are "the

immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation . . . . . In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal." Hamilton, following up these statements, forcefully emphasized the sovereignty enjoyed by each member state of the Union.

It flows as a logical consequence from the concept of sovereignty, as envisioned by the founding fathers, that in disputes between states or a state and the citizens of another state, infringing upon a state's sovereign interests, the issues must be determined not by the municipal law of one or the other opposing parties but rather by an "interstate law"—a law which, so to speak, transcends the law of the individual states and does not derive its force from them. Were it otherwise, a state, filing suit in its sovereign capacity and claiming encroachment on its sovereign rights, might be subjected with respect to the determination of its sovereign interests to the municipal law of another state. Such subjection would be indeed intolerable; it would be destructive and in clear contradiction of the very essence of the principle of sovereignty, which, under the constitutional concept, is premised upon the equality of states before this Court. *Kansas* v. *Colorado*, 206 U. S. 46 at 95, 97, 98, 51 L. ed. 956 at 974, 975 (1907). This, in turn, necessitates the application of a law which is not the creature of one state, local in its scope, but rather reaches beyond the state's boundaries, in brief, is "interstate." Thus the

existence and application of "interstate law" to disputes between states and the idea of sovereignty are interrelated and interdependent. "The latter justifies the former; the former is made necessary by the latter." (Note: What Rule of Decision Should Control in Interstate Controversies, 21 Harv. L. R. 132 at 133 (1907)).

B. This Court Has Recognized a Body of Interstate Common Law.

This Court has repeatedly recognized the existence of a body of "interstate common law," made up of a number of components, applicable in the settling of interstate disputes. It has clearly and precisely articulated the principle in *Kansas* v. *Colorado,* 206 U. S. 46 at 98, 27 S. Ct. 655 at 667, 51 L. ed. 956 at 975 (1907). There Mr. Justice Brewer quoted first the words of Chief Justice Fuller that this Court was sitting in interstate disputes as an international, as well as a domestic tribunal, applying federal, state and international law as the exigencies of the particular case might demand. Then he went on to say:

> One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of Missouri v. Illinois, supra, the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this Court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. **In other words, through these successive disputes and deci-**

> **sions, this court is practically building up what may not improperly be called interstate common law.** (Emphasis supplied).

This Court adhered through the years to the principle that in cases in which the sovereign character of the litigating states is affected, such as in interstate water and boundary disputes, federal substantive law will govern the controversy. In *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U. S. 92 at 110, 58 S. Ct. 803 at 811, 82 L. ed. 1202 at 1212, 1213 (1938), this Court articulated these ideas in precise and succinct terms:

> For whether the water of an interstate stream must be apportioned between the two States is a question of "federal common law" upon which neither the statutes nor the decisions of either State can be conclusive. *State of Kansas* v. *Colorado,* 206 U. S. 46, 95, 97, 98, 27 S. Ct. 655, 51 L. Ed. 956; *Connecticut* v. *Massachusetts,* 282 U.S. 660, 669, 671, 51 S. Ct. 286, 289, 75 L. Ed. 602; *New Jersey* v. *New York,* 283 U.S. 336, 342, 343, 51 S. Ct. 478, 479, 75 L. Ed. 1104, *Washington* v. *Oregon,* 297 U. S. 517, 528, 56 S. Ct. 540, 545, 80 L. Ed. 837. **Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions.** (Emphasis supplied).

Significantly, these words were spoken by Mr. Justice Brandeis in a case which was decided by this Court on the same day on which *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188, was decided, and in which this Court had not exercised original jurisdiction but which had reached this Court upon certiorari from state court proceedings instituted by a private company against a state water official. Nevertheless, it was recognized that interstate water disputes should be governed and settled by federal law.

C. Since the Sovereign Interests of Two States are Pitted Against Each Other, Federal Law Must Be Applied Regardless of Whether the Action is Directed Against a State or a State Agency.

Though the principle of applicable federal substantive law has been, in general, enunciated by this Court in controversies of states inter *sese,* it applies with full force to the factual and legal situation presented in the instant proceedings. Again it must be emphasized that the present action is in effect directed against a state, pertaining in its real sense to the use of interstate waters; that in itself would be sufficient for the applicability of federal law in the determination of the substantive issues.

But even if form is elevated over substance and the complaint is judged by its face as not directly involving a state, federal law must still govern the dispute. The very nature of the dispute demands that. This is not a controversy between a state and non-resident individuals concerning decedents' estates, motor vehicles, business torts, government contracts or taxes. There state law may well apply. This is a case radically different; it involves the exercise of a state's police power in the field of public health by political subdivisions and agencies of one state to the detriment of the citizens of another state. Such dispute goes to the very core of the relations between two states within the federal-state framework and affects and touches the sovereign rights and powers of both; this is so whether the state against whose agencies the proceedings are directed is an immediate party to the dispute or not. Here the interests of two states are in harsh competition with each other, political subdivisions of one state claiming that they may use, in the exercise

of their public health functions, interstate waters and public water supplies in one way, the other state complaining that such use is inimical to its public health because it contaminates those very waters and constitutes a danger to the life of its citizens. Such conflicting state interests spawning virulent controversies between the antagonists do not lend themselves to, and cannot be settled by, the application of narrow state law principles which by their very nature are fashioned by, and attuned to, the parochial interests of the state whose law is applied. Controversies of that nature must be determined and judged by a law which transcends the local rules of each state and adopts norms that embrace within their purview the sovereign interests of the affected states, viewed in the light of a sound and viable federal system. The interstate federal common law, derived from various sources, federal, state, international "as the exigencies of the case may demand" (*Connecticut* v. *Massachusetts*, 282 U. S. 660 at 670, 51 St. Ct. 286 at 289, 75 L. Ed. 602 at 607). furnishes these state-transcending norms of decision.

D. The Impact of the Present Controversy Upon the Federal Structure Calls for the Application of Federal Law.

There is another reason why federal law must govern the issues raised in the present case. This dispute, though cloaked in the innocuous mantle of a simple tort, affects to a vital degree federal law and has a serious impact on the structure of the federal system.

The various federal laws and regulations covering a number of problems relating to navigable waters involved here, though not governing the situation at hand, must

be taken into consideration in determining the dispute. Federal laws such as those designed to protect the environment (Federal Water Quality Act of 1965, 33 U.S.C.A. §§1151 et seq.) or the fish and wildlife (16 U. S. C. A. §665) or the navigable waters (33 U. S. C. A. §§403 et seq.) give to the case, independent and apart from the problem of antagonistic sovereign interests within the structure of interstate relations, a federal hue and coloration which call forcefully for the application of federal law. The utilization of federal principles alone, applied against the backdrop of these federal statutes in the decision-making process, can assure the proper accommodation and safeguarding of the public policy considerations and legislative aims embodied in these statutes and give them the harmonizing cohesion required by a sound and workable federal system. Again, the law of a state is not equipped to accomplish that task; it is guided, as it necessarily must be, by local interests and policy considerations. Obviously, the resolution of the relative rights of the contending parties respecting the waters in question, viewed under these aspects, should not and could not "depend upon the same considerations and is not governed by the same rules of law that are applied in . . . States for the solution of similar questions of private right." (*Connecticut* v. *Massachusetts,* 282 U.S. 660 at 670, 51 S. Ct. 286 at 289, 75 L. ed. 602 at 607 (1931)).

It should be emphasized in this connection that it would be totally anomalous if federal law were not applied in the present case. It was previously stressed that this Court had repeatedly recognized the applicability of federal common law in the settlement of controversies between states concerning water rights and water usages if this Court's jurisdiction had been invoked. For example,

Mr. Justice Holmes in *New Jersey* v. *New York*, 283 U. S. 336 at 342, 343, 51 S. Ct. 478 at 479, 75 L. ed. 1104 at 1106 (1931), declared:

> We are met at the outset by the question what rule is to be applied. It is established that a more liberal answer may be given than in a controversy between neighbors members of a single State. *Connecticut* v. *Massachusetts*, 282 U.S. 660, 51 St. Ct. 286, 75 L. Ed. 602, February 24, 1931 (see, also, Id., 283 U. S. 789, 51 S. Ct. 356, 75 L. Ed. ——). Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war. In a less degree, perhaps, the same is true of the quasi-sovereignties bound together in the Union. A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it.

If a conflict regarding water use arises, not between two states, but rather between a state and an agency or political subdivision of another state, should that difference really influence the choice of the applicable law? Should federal law suddenly have to yield to state law, simply because an agency of the state, deriving its power from the state, rather than the state itself, is a party to the suit? This would be indeed a distinction without difference, lacking any sense or reason. The conflicting water use claims put forth by virtue of the right of sovereignty, as expressed in the exercise of police power in the field of public health, would be just as potent and deserving of judicial recognition by this Court in one case as in the other. This holds particularly true in the instant matter, in which the political subdivisions involved represent the largest concentrations of population and industry in the State of Wisconsin.

E. The Constitutional Grant of Jurisdiction Gives to This Court the Authority to Make Its Own Rules of Decision.

Apart from the considerations previously mentioned, it can well be said that the constitutional grant of jurisdiction invests this Court with the power to make its own rules of decision which obviously must conform to and be within the boundaries of the state-federal constitutional structure from which this Court derives its authority. Chief Justice Taney recognized and acknowledged that decisional rule-making power of the Court when he declared (*Kentucky* v. *Dennison,* 24 How. 66 at 98 (U.S. 1859), 18 L. ed. 717 at 726), that insofar as this Court is given original jurisdiction by Article III of the Constitution it has the authority "to exercise it without further Act of Congress to regulate its process or confer jurisdiction; and that the Court may regulate and mold the process it uses in such manner as in its judgment will best promote the purposes of justice." It is respectfully submitted that the decision-making rules adopted by this Court in settling disputes decided under the original jurisdictional power of this Court become, by force of their adoption and application by this Court, federal rules since this Court metes out justice as a federal tribunal. Hence even if this Court were to adopt state law for the settling of a dispute, over which it assumes original jurisdiction, the state law so adopted would become automatically federal law. But be that as it may, the stark fact remains that the interstate ramifications and the conflicting sovereign interests demand clearly the application of true federal principles, unfettered by the confining and stifling tenets of local law which do not focus upon the broad vistas of the federal structure.

F. The Factual and Legal Issues Presented in the Instant Case Differ Widely from Those in Ohio v. Wyandotte Chemicals Corporation.

Ohio v. *Wyandotte Chemicals Corp.*, 91 S. Ct. 1005 (1971), which was decided by this Court after the present application for the exercise of original jurisdiction had been made and which dealt with federal and state jurisdictional problems, can be readily distinguished from the situation presented here. In the first place, *Wyandotte* was a case in which the State of Ohio attempted to invoke this Court's original jurisdiction in an action brought against several *private corporations* charged with the contamination of Lake Erie by having allegedly dumped mercury in the lake's tributaries. Contrariwise, the present proceedings are not directed against private persons but against *political subdivisions and governmental agencies of a state* for their acts and activities in carrying out their governmental functions delegated to them by the state in the field of public health. While *Wyandotte* did not involve any competing issues of sovereignty, the instant case represents a direct clash between vital, conflicting sovereign interests. The *Wyandotte* case pertaining to private defendants only could be readily decided by means of an appropriate long-arm statute in an Ohio state court under Ohio state law. The present case cannot be determined in an Illinois state court. Since the defendants in the case at hand are political subdivisions and public agencies of the State of Wisconsin, they are not amenable to Illinois legal processes; even if, theoretically, under the Illinois long-arm statute, service could be obtained upon these Wisconsin public agencies, there is certainly no legal way of forcing them to comply with any Illinois court decree, especially not

one of an injunctive nature. Nor is there any reason to believe that the Wisconsin public agencies would voluntarily accept and implement the decree of an Illinois court—a decree issued by an out-of-state court, attempting to regulate the intrastate, public functions of governmental agencies. Moreover, the Wisconsin agencies and courts could not be forced under the full faith and credit clause of the Constitution to give recognition to an Illinois decree of such a nature.

The same which holds true of an Illinois court procedure applies with equal force to any action instituted in a federal court, were such jurisdiction to exist at all. Under the present status of the law an action in the federal district court could not be commenced by the State of Illinois since, as indicated by this Court in footnote 3 to the *Wyandotte* decision (91 S. Ct. 1005 at 1009, 1010), the jurisdictional prerequisites for such action would be lacking. Thus, the only judicial recourse—if that appellation can be properly used in this connection—available to the plaintiff, State of Illinois, would be a suit filed in a Wisconsin state court. Apart from the fact that it is rather doubtful whether the State of Illinois, suing in its sovereign capacity, could file such action at all, Illinois would automatically subject itself to the jurisdiction and laws of Wisconsin; yet, that being the case, Illinois, obviously, would have very little chance of success in its quest for legal action against Wisconsin governmental agencies. Moreover, Illinois would have to meekly submit the adjudication of its sovereign rights and interests to the dictates of Wisconsin's tribunals. Thus, contrary to *Wyandotte*, there is in this case no other appropriate judicial tribunal available to the plaintiff State than that afforded by this Court; only in this Court

can plaintiff's sovereign rights be properly recognized, protected, and vindicated. This, in turn, can be achieved only through the application of federal norms.

In *Wyandotte,* contrary to this case, the issues were essentially bottomed on local law; their determination would have had but little effect on federal-state relations. This case, on the other hand, as repeatedly mentioned, raises grave and serious problems concerning sovereign states rights and powers within the federal system; it is, therefore, of national import, and, it is respectfully urged, should be decided by this Court.

In contradistinction to *Wyandotte,* where state courts and other regulatory bodies had dealt with the issues involved and a proliferation of remedial activities had occurred, no judicial action was ever taken in the present case nor could it be appropriately taken by any other tribunal than by this Court.

CONCLUSION

It was pointed out throughout this brief that the present case represents in effect and political reality a confrontation of sovereign interests within the constitutional framework. The impact upon the federal structure is obvious. It demands a solution on the basis of federal principles which transcend the local laws and parochial concerns of the individual states.

Respectfully submitted,

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